Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1407

JAMES H. BOONE
Defendant-Petitioner

versus

STATE OF LOUISIANA
Plaintiff

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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NO.

JAMES H. BOONE
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v.

STATE OF LOUISIANA
Plaintiff

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

James H. Boone, your Petitioner, prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Louisiana which affirmed a conviction of your petitioner of two counts of the offense of arson with intent to defraud in Fourth Judicial District Court, Ouachita Parish, Louisiana.

OPINIONS BELOW

SUPREME COURT OF LOUISIANA. The opinion of the Louisiana Supreme Court bears the style and citation as follows: State of Louisiana v. James H. Boone, 364 So.2d 978 (La. 1978). A copy of the opinion is appended to this petition and made part hereof. (See Appendix A).

FOURTH JUDICIAL DISTRICT COURT, QUACHITA PARISH, LOUISIANA. The trial judge did not write or render a general or comprehensive opinion. He did write a *per curiam*

to assignment of error # 1. A copy of the *per curiam* is appended to this petition and made part hereof. (See Appendix B). The reasons assigned by the trial judge reflecting other rulings complained of herein are reflected in the minutes of court, parts of which are appended to this petition and made part hereof. (See Appendix C).

JURISDICTION

The judgment and opinion of the Court below (See Appendix A) was entered on November 12, 1978. Rehearing was denied on December 14, 1978.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.Code Section 1257(3).

THE QUESTIONS PRESENTED

Part 1:

Whether in state criminal proceedings, the prosecution is relieved of its obligation under the Sixth and Fourteenth Amendment to give defendant notice of the charges pending against him by offering in lieu thereof to permit the defendant or his attorney to examine certain physical evidence in the possession of the prosecution.

Part 2:

Whether Article 1, Section 17 of the Louisiana Constitution and Article 782 of the Louisiana Code of Criminal Procedure which permit trial of a defendant on a felony charge before a jury of six persons, five of whom must concur to render a verdict, violates the jury trial rights under the Sixth Amend-

ment of the United States Constitution or the Due Process right under the Fourteenth Amendment of the United States Constitution

Part 3.

Whether upon timely request, a defendant or his attorney is entitled to examine a copy of a pre-sentence investigative report ordered prepared by a court and used by it in imposing sentence upon defendant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Constitution of 1974, Article 1, Section 17.

A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

West's Louisiana Code of Criminal Procedure, Article 782.

A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, five of whom must concur to render a verdict.

B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases.

West's Louisiana Revised Statutes, Title 14, Section 53.

Arson with intent to defraud is the setting fire to, or damaging by an explosive substance, any property, with intent to defraud.

Whoever commits the crime of arson with intent to defraud shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

West's Louisiana Code of Criminal Procedure, Article 877.

The pre-sentence or post-sentence investigation report shall be privileged and shall not be disclosed directly or indirectly to anyone other than the sentencing court, members of the division of probation and parole supervision, the officer in charge of the institution to which the defendant is committed, the parole board, the probation or the parole officer if the defendant is placed on probation or released on parole, medical authorities if the defendant is committed to a hospital, the pardon board and the governor or his representative.

Before imposing sentence the court may advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation report. The sources of confidential information shall not, however, be disclosed.

STATEMENT OF THE CASE

Petitioner-defendant, James H. Boone, was charged by an amended indictment with two counts of arson with intent to defraud, felonies under the laws of the State of Louisiana, punishable by fines of not more than two thousand dollars ($2,000.00), or imprisonment, with or without hard labor for not more than five years, or both, on each count.

Article 53 of the Criminal Code defines the crime charged as follows:

> "Arson with intent to defraud is the setting fire to, or damaging by any explosive substance, any property, with intent to defraud."

Inasmuch as the crime may be committed by either of two methods, "by an explosive substance" or "by setting fire to," the defendant requested by a pre-trial motion for Bill of Particulars that he be informed the method the state intended to prove. The trial judge sustained the state's refusal to disclose which method was used to commit the offense.

The two felony charges against the defendant were tried by a six person jury which was instructed that only five must concur in order to render any verdict on each count of the indictment.

After defendant's conviction, the court ordered a pre-sentence investigative report to be prepared in accordance with Article 877 of the Louisiana Code of Criminal Procedure. At the sentence hearing, the request of the defense attorney for a copy of the pre-sentence investigative report was denied by the trial judge. Defendant was sentenced to

three years at hard labor, suspended and placed on supervised probation for five years on one count of the indictment. On the second count, he was sentenced to serve five years in the Ouachita Parish Jail, the said sentence to be consecutive and not to be suspended. Defendant's conviction was affirmed by the Louisiana Supreme Court on November 13, 1978, and rehearing was denied on December 14, 1978. On December 22, 1978, acting Chief Justice of the Louisiana Supreme Court, Honorable Frank W., Summers, issued an order staying all proceedings for ninety (90) days from the 14th day of December, 1978.

REASONS FOR GRANTING THE WRIT

Part I. Lack of Notice of Nature and Cause of Accusation.

The amended indictments charge that defendant, James Boone, did:

> "On September 11, 1975, commit arson of property, a dwellinghouse and its contents at 21 Magnolia Drive, Monroe, Ouachita Parish, Louisiana, the property of Levi Redding with the intent to defraud State Farm Fire and Casualty Company of the sum of $51,228.09, contrary to the provisions of R.S. 14:53."

> "On or about November 29, 1975, commit arson of property, a dwelling house and its contents located at Kendlewood Drive, West Monroe, Ouachita Parish, Louisiana, with the intent to defraud Aetna Fire Insurance Company and United States Fidelity and Guaranty Company of the sum of $250,000.00 contrary to the provisions of R.S. 14:53."

This matter concerns itself with the adequacy of the state's response to the Motion for Bill of Particulars. The crime charged is defined in Article 53 of the Criminal Code as follows:

> "Arson with intent to defraud is the setting fire to, or damaging by any explosive substance, any property, with intent to defraud."

The defendant sought to learn by Bill of Particulars whether the offense was committed "by an explosive substance" or "by setting fire to".

The state declined to answer and offered instead to let the defendant examine its physical evidence. The Louisiana Supreme Court in its opinion correctly found that the information sought by the defendant was that to which he was entitled. However, the Louisiana Supreme Court sought to carve out a special exception in the following language, to wit:

> "While ordinarily the state would be required to disclose which method was used to commit a crime, when the statutory definition of a crime sets forth two methods by which it may be committed, circumstances may alter such a requirement. This case presents such an exception. Here the state has offered the defense the opportunity to examine the physical evidence to be presented to the jury in order that the defendant might draw his own conclusions as to how the fire was set." *State of Louisiana v. James H. Boone*, 364 So.2d 979, 980 (1978).

The prosecutors for the State of Louisiana, the trial court, and thereafter the Louisiana Supreme Court fell into the same basic error. They incorrectly attributed the purpose of the Bill of Particulars as a discovery device. In fact, it is not. It is a document that has for its purpose the supplementing of a short form Indictment or Bill of Information. Whenever the short form method of charging a criminal offense is used, the accused is entitled, as a matter of right, to a particularization thereof upon the timely filing of a Motion for Bill of Particulars. Louisiana Constitution, Article 1, Section 13, Louisiana Code of Criminal Procedure, Article 848, *State v. Barnes*, 242 La. 102, 134 So.2d 890 (1961), *State v. Holmes* 223 La. 397, 65 So.2d 890 (1953).

Moreover, the Sixth Amendment of the United States Constitution, in part, provides:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation..."

The short form indictment is only conditionally constitutional. The condition is that an adequate Bill of Particulars be furnished. The error in the present case is that it confuses the charging nature of a Bill of Information as supplemented by a Bill of Particulars with the question of discovery. The illogic of the present decision would permit the charging of a defendant with a defective Bill of Information merely by the offer of the state to permit the defendant to examine its evidence.

Further, even had the defendant accepted the state's offer to inspect the physical evidence and formed its own conclu-

sions, these conclusions would not have been binding on the state at the trial. That is why the Bill of Information (as supplemented by the answers to the Bill of Particulars) must be the work product of the state or government. It is the accusation. The defendant is entitled to be informed of the nature of the accusation against him. It is not proper to advise the defendant to look around and pick out the accusation which he thinks fits.

Part II. Constitutionality of Non-unanimous Six Person Jury in Felony Case.

Article 782 of the Louisiana Code of Criminal Procedure and Article 1, Section 17 of the Louisiana Constitution provides that certain felony prosecutions are tried by a jury of six persons, five of whom must concur to render a verdict. Defendant, James H. Boone, was tried on two such felonies punishable by a total fine of $4,000.00 or total imprisonment of ten years at hard labor, or both.

The record in this case shows that the defendant was tried by a six person jury and that it was instructed to the effect that five out of six could return a verdict of "guilty". Such a trial violates defendant's rights under the Sixth and Fourteenth Amendment to the United States Constitution. Specifically, a trial jury of only five persons has been held to be in violation of the Sixth and Fourteenth Amendments of the United States Constitution by the United States Supreme Court in *Ballew v. Georgia*, U.S. , 98 S.Ct. 1029 (1978).

Although the United States Supreme Court in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970) had previously

upheld against the constitutional attack a six person jury, the Court placed some reliance on the fact that a unanimous jury was there involved. The Court said:

> "But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers 6, than when it numbers 12 - particularly if the requirement of unanimity is retained. *Williams v. Florida*, 90 S.Ct. 1893, 1906, (1970).

In the *Ballew* case, a unanimous five person jury was involved. In the present case, with a six person jury, they were instructed that five could return a verdict for guilty. If the jurors' vote for guilty or not guilty had mathematical values, it would be apparent at once that Louisiana's five out of six jury requirements is at least one juror less constitutional than the jury in the *Ballew* case. The *Ballew* jury (five minus zero equals five) produced a plurality of five, the Louisiana six person jury (five minus one equals four) permits a guilty verdict by a plurality of four.

That six jurors were selected for the trial of this case is found in the Minutes of Court at p. 12 of this record. The judge's charge is found in this Record on p. 103 and in part, it states:

> "Five of the six of you must concur in order to render any verdict, on each count, and it must and can only be one of those listed on the form. When you have reached your verdict, five of the six of you having agreed on the same verdict, your foreman shall write that verdict on the back of the form, using the actual word describing the verdict. (See Appendix D).

Although the actual verdict in this case appears to be unanimous (see p. 105 and 106 of the record), the importance of any dissenting vote had been rendered meaningless by the judge's instruction. Any juror who was not satisfied with the evidence had in effect been told by the judge's instructions that his single vote could not affect the outcome and there is no way of knowing that the sixth vote did not merely go along with the majority. The strength in persuasion and argument that an individual juror could have held in the event the court had required a unanimous jury verdict was missing from this case. Thus, it is no answer that the vote was in fact unanimous. If a defendant is entitled to a unanimous vote from the jury, then a corollary of that proposition is that he is entitled to have the jury so instructed prior to deliberations in order that each juror be aware of the individual importance of his vote. In effect, the Louisiana six man jury is nothing in the world except the unconstitutional unanimous five man jury under the *Ballew* case and one additional vote which does not count.

Part III. Refusal to Furnish Defendant with Copy of Pre-sentence Investigation.

Defendant contended in his brief to the Louisiana Supreme Court that the trial judge erred in refusing to make available the pre-sentence investigative report to the defendant or his attorney prior to sentencing and that this constituted reversible error. The Louisiana Supreme Court indicated there was an absence of a designation of the portion of the record which established the defense counsel made a timely request to view the pre-sentence report and, in reliance on *State v. Berain*, 360 So.2d 822 (La. 1978), held that in the absence of any showing that the pre-sentence report contained false information prejudicial to the defendant that

there was no error.

This issue concerns the refusal of the trial judge to make available, upon timely requests, to the trial defense attorney the pre-sentence report so that it could be discovered whether it contained false, misleading, or prejudicial material to which the defendant would have been entitled to make rebuttal under the Louisiana Supreme Court decision of *State v. Underwood*, 353 So.2d 1013 (La. 1978). It is submitted that the Louisiana Supreme Court in the instant case made three errors upon ruling of this matter:

> First, it incorrectly concluded that the relevant portion of the record was not before it.
>
> Second, it incorrectly concluded that the prior case of *State v. Berain*, 360 So.2d 822 (La. 1978) was applicable to the present situation.
>
> Thirdly, it assumed that a defense attorney can do the impossible and demonstrate that false material is in a pre-sentence report when it is legally privileged and the contents of its facts are withheld from the defense.

The Louisiana Supreme Court in its opinion stated:

> "In the absence of a designation of that portion of the record which would establish that defense counsel made a timely request to view the pre-sentence report which was denied, and in the absence of any showing whatever that the pre-sentence report contained false information prejudicial to defendant, this court's unanimous opin-

ion in *State v. Berain*, 360 So.2d 822 (La. 1978), is controlling." *State v. Boone*, 364 So.2d 978, 983.

In the first place the defense attorney made timely requests for the pre-sentence investigation. This is reflected in the Minutes of Court of September 19, 1977, which is found at p. 20 of the Record lodged in the Louisiana Supreme Court. It stated in part:

> "Defendant present with his attorney, Honorable James A. Hobbs, and at this time Mr. Hobbs, on behalf of the defendant requested a copy of the pre-sentence investigation and to said request the court denied, and to the Court's ruling Mr. Hobbs requested that his right be reserved to the Bill of Exception, to which the court noted."

Defendant's Designation of Record filed pursuant to Article 845 of the Louisiana Code of Criminal Procedure, and found at p. 111 of the Record in the Louisiana Supreme Court designates under Item c. "The Minutes of Court". Accordingly, the request for the pre-sentence investigation report and the denial of it is before the Louisiaana Supreme Court. The matter is discoverable by a mere inspection of the record without examination of evidence and was both briefed and orally argued to the Louisiana Supreme Court.

Secondly, *State v. Berain*, cited by the Louisiana Supreme Court is not applicable for the *Berain* case states:

> "Moreover, the record does not contain a request by the defense for the report. *Absence such a request*, we find no error."

Thus, the *absence of the request* in the *Berain* case prevents it from being authority in the instant case where such a request was made and refused.

Thirdly, to require the defendant to show that the pre-sentence report contained false information prejudicial to the defendant but at the same time to prevent the defendant from discovering the contents of the pre-sentence report is an absurdity and is contradictory in its terms. How can the defendant show the material to be false if in fact its contents remain a secret from him? If the Due Process of law which the *Underwood* case signaled is to have any implementation, it must be by the disclosure of the pre-sentence report upon timely request. The Court is asked to ponder this strange situation which presently exists in this case: While it may be said that the record does not affirmatively show the presence of false information prejudicial to the defendant in the pre-sentence report, it equally fails to show the absence of false information prejudicial to the defendant. The sole person who has the responsibility of representing the defendant's interest in the fair trial guaranteed him under the Due Process provision of the Constitution is about the only person on trial level who is not privy to the contents of the pre-sentence report.

Significantly, Louisiana Code of Criminal Procedure, Article 877 does not prohibit making portions of the pre-sentence investigative report available to the defendant. It, in part, provides:

> "Before imposing sentence, the court *may* advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation report. The sources of confidential informa-

tion shall not, however, be disclosed."

The United States Supreme Court has recognized the application of the Due Process Clause to the sentencing stage in *Gardner v. Florida,* U.S. ,97 S.Ct. 1197 (1977), when it stated:

> "Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Garnder v. Florida,* U.S. , 97 S.Ct. 1197, 1205 (1977).

In *Gardner v. Florida, supra,* a capital case, the United States Supreme Court specifically held that the pre-sentence report was not privileged from disclosure to the defense counsel. Louisiana has applied *Gardner v. Florida, supra,* to establish Due Process sentence hearings in state courts under *State v. Underwood,* 353 So.2d 1013 (La. 1977) and *State v. Segers,* 357 So.2d 1 (La. 1978). However, in the instant case, the defense attorney was denied upon timely request, a copy of the pre-sentence report and the Due Process hearings to which he would have been entitled under the federal standards in *Gardner v. Florida, supra,* and state standards in *State v. Underwood, supra,* and *State v. Segers, supra,* were rendered negatory.

Although it may be said that the defendant was permitted to confront his accusers at the time of the trial, he was not permitted to confront his accusers at the sentence hearing and therefore, he was denied not only Due Process of law insofar as it applies to sentencing but he was also denied his Sixth Amendment right to confront his accusers to the extent that any detrimental, prejudicial, or harmful information was contained in the pre-sentence investigative report.

CONCLUSION

For the foregoing reason, it is respectfully submitted that the decision of the Court below is erroneous, and that the present petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing Application has been served upon the opposing counsel: William J. Guste, Jr., Attorney General, State of Louisiana, State Capitol, Baton Rouge, Louisiana; J. Carl Parkerson, District Attorney, Fourth Judicial District, Monroe, Louisiana, Brian E. Crawford, Special Counsel, District Attorney's Office, Fourth Judicial District, Monroe, Louisiana, by placing the same in the United States Mail, properly addressed, with sufficient postage affixed thereto.

Alexandria, Louisiana this day of March, 1979.

_____

J. MICHAEL SMALL

APPENDIX A

STATE of Louisiana

v.

James H. BOONE

No. 61782

Supreme Court of Louisiana

Nov. 13, 1978.

Rehearing Denied Dec. 14, 1978.

SUMMERS, Justice

By an August 22, 1977 amended indictment, defendant James H. Boone was charged in two counts with arson with intent to defraud on September 11, 1975, and arson with intent to defraud on November 29, 1975, offenses reprobated by Article 53 of the Criminal Code. In a trial before a jury of six on August 22, 1977, defendant was found guilty on both counts. On the September offense he was sentenced to serve three years at hard labor, the sentence being suspended and defendant placed on probation for five years. On the November offense he was sentenced to imprisonment in the parish jail for five years. Four assignments of error are urged on this appeal for reversal of the conviction and sentence. In addition, defendant claims an error patent on the face of the record.

Assignment 1: Prior to the amended indictment upon which this prosecution is based, defendant was originally charged on November 23, 1976 jointly with Willie D. Allen in a four-count indictment. Count one charged simple arson on, or about, October 13, 1970. Count two charged arson with intent to defraud on June 2, 1974. Count three charged arson with intent to defraud on September 11, 1975. And count four charged arson with intent to defraud on November 29, 1975. The last two charges being the ones upon which this prosecution is based.

With the indictment in this posture, a December 20, 1976 defense motion for a bill of particulars was filed containing sixty-four requests for information. Only thirty-one of these requests pertain to the counts which were eventually prosecuted in this case, because count one charging simple arson was severed on May 5, 1977, and count two was also severed prior to trial.

Insofar as pertinent to the counts upon which this prosecution is based, the motion for particulars asked in connection with each count, whether the State contended that the damage to the buildings or structure mentioned in the amended indictments was caused by an explosion or fire. To these requests the prosecution answered, "The State is not required to reveal its evidence." Defense counsel then filed a motion to compel the State to furnish the information requested. At the hearing on this motion the State's attorney took the position that an answer to the defendaant's request would require the State to disclose its physical evidence, which it was not compelled to do. Nevertheless, the prosecutor stipulated that the State had no objection to the appointment of an independent expert designated by the defense to examine the State's evidence under court supervision, in order that the defense could arrive at its own conclusions regarding which method was used to commit the crime involved.

While sustaining the prosecution's answer to the motion for bill of particulars, the trial judge approved the State's offer to permit the defense to examine the pertinent evidence in order that the defense could arrive at its independent conclusion as to which method was used to commit the alleged arson. Accordingly the trial judge fixed a time within which the defense should move to avail itself of the State's offer. In its brief the State asserts that the defense has never availed itself of the offer, and this is not denied.

The charges involved set forth that James H. Boone did:

> "On September 11, 1975, commit arson of property, a dwellinghouse and its contents at 21 Magnolia Drive, Monroe, Ouachita Parish, Louisiana, the property of Levi Redding with the intent to defraud State Farm Fire and Casualty Company of the sum of $51,288.09, contrary to the provisions of R.S. 14:53.
>
> "On or about November 29, 1975, commit arson of property, a dwelling house and its contents located on Kendlewood Drive, West Monroe, Ouachita Parish, Louisiana, with the intent to defraud Aetna Fire Insurance Company and United States Fidelity and Guaranty Company of the sum of $250,000.00 contrary to the provisions of R.S. 14:53."

Article 53 of the Criminal Code defines the crime charged as follows: "Arson with intent to defraud is the setting fire to, or damaging by any explosive substance, any property, with intent to defraud."

Inasmuch as the crime may be committed by either of

two methods, "by an explosive substance" or "by setting fire to," defendant contends he should be advised of the method the State intends to prove.

[1-3] While ordinarily the State would be required to disclose which method was used to commit a crime, when the statutory definition of a crime sets forth two methods by which it may be committed, circumstances may alter such a requirement. This case presents such an exception. Here the State has offered the defense the opportunity to examine the physical evidence to be presented to the jury in order that defendant might draw his own conclusion as to how the fire was set. Under the State's offer, approved by the trial judge, if defendant had availed himself of this right to inspect and analyze the physical evidence, he would know as much about how the fire was set as the State knew. This being the case, no reversible error is shown. The State should not be compelled to bind itself to a conclusion concerning a scientific analysis which the jury may not accept. Such a matter falls within the jury's fact-finding prerogative. The State did all it should do when it made the evidence available to the defense in advance of trial. *State v. Mason*, 305 So.2d 523 (La. 1974). This assignment is without merit.

Assignment 2: On December 23, 1976, when the indictment contained four counts, defendants Boone and Allen jointly filed a motion to quash the indictment based on the allegation that the crimes charged were not of the same or similar character, or based on the same act or transaction connected together or constituting a common scheme or plan. Thereafter two counts of the indictment were severed, and the charge against Allen was deleted from this indictment.

At a time when the indictment had been amended to reduce the charges to three counts, and defendant Boone was still jointly charged with Allen, they filed a motion to sever. In that motion defendants simply alleged that if the State were allowed to proceed and prosecute them for all three offenses in one trial, they would be denied a fair determination of their guilt, or innocence on each charge. Thereafter, prior to trial, another count of the indictment was severed, leaving the two charges upon which this prosecution proceeded. Also, as noted, the charge against Allen was dropped from this indictment.

To some extent, therefore, the motion to quash and the motion to sever were satisfied. Defendant, however, maintains that it was error for the trial judge to deny the motion to quash as to the remaining two charges for which he was convicted.

[4] Considered together, the motion to quash and the motion to sever present the issue: Were these two offenses properly joined? Although no transcript of the hearing held prior to trial on these motions appears in the record, on the basis of the quoted articles of the Code and extracts of the evidence at the trial, the following conclusions can be drawn from the charges.

Article 493 of the Code of Criminal Procedure permits the joinder of offenses in these terms:

> "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more

acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial."

These offenses are charged in the same indictment in separate counts for each offense. They are offenses of the same or similar character. Both involved the setting of fires to dwelling houses to defraud insurance companies. The offenses involved dwelling houses in rather close proximity – one in Monroe and the other in West Monroe in Ouachita Parish. Also, the offenses were closely related in point of time, having occurred about ten weeks apart. Finally, at defendant's election the offenses were tried by the same mode of trial, thus fulfilling the requirements for joinder set forth in Article 493.

[5] These pretrial motions for severance on application of the defendant should not be granted unless "it is deemed appropriate to promote a fair determination of defendant's guilt or innocence of each offense." La.Code Crim. Pro. art. 495.1.

Aside from citing the pretrial severance standards set forth in *State v. Carter*, 352 So.2d 607 (La.1977), and a general statement to the effect that the trial judge fell into legal error when he refused to sever the offenses charged, the defense has not pointed out to this Court wherein severance "is deemed appropriate to promote a fair determination of defendant's guilt or innocence on each offense." An independent review of this record also fails to disclose wherein the determination of defendant's guilt or innocence on each offense has been prejudiced by the joinder. There is, therefore, no showing which would warrant a finding that the trial judge erred in denying severance.

Assignments 3 and 4: At the trial Levy Redden, whose residence at 21 Magnolia Drive in Monroe was burned, testified that he had pled guilty to arson with intent to defraud his insurer. He testified that he negotiated with defendant Boone and Willie D. Allen to have the house burned in order to collect the insurance, paying them ten percent of the amount to be recovered from the insurance company for the loss of the building.

According to Redden's testimony he owned two residences during February 1975, a rental dwelling in Farmerville and his residence on Magnolia Drive in Monroe. Both were insured against loss by fire.

Redden was in financial difficulties at the time and mentioned this fact to Allen. As a result of gentle persuasion by Allen, Redden agreed that Allen would burn the house in Farmerville. The Farmerville house was then occupied by tenants who would not vacate until the end of the school term in May.

Boone entered into the conspiracy to burn the Farmerville house during the month of June 1975, after the tenants vacated the house. An agreement was reached whereby Redden would pay Boone and Allen ten percent of the money collected from the insurance company when the house was destroyed by fire. Redden was required to pay $800 in advance, which he did by borrowing that amount from a bank in West Monroe. It was planned that Allen and Boone would burn the house during the month of June. However, the plan aborted because new tenants moved into the vacated house two days earlier than anticipated. Despite Redden's efforts, at Boone's suggestion, to have the tenants delay moving into the house in order that the burning could

be accomplished, they were unwilling to cooperate. The plan to burn the house was therefore abandoned, for Redden refused to have it burned while it was occupied.

This development required a change of plans and, at Boone's suggestion, the conspiracy shifted to the burning of Redden's Magnolia Drive residence in Monroe. Because of the changed circumstances Redden was required to pay Boone an additional $400. It was also understood that Redden would go on a vacation during the month of July and the house would be burned during his absence. In keeping with this revised scheme, Redden left a house key with Boone and he and his family traveled to Arkansas and Missouri on vacation. On his return five days later, the house had not been burned. Disappointed, Redden contacted Boone for an explanation.

Shortly thereafter Redden traveled to Florida with his family expecting the house to be burned on his return. From Florida he telephoned Boone to inquire if the house had been burned, at which time Boone explained that the man who was to do the job was in the hospital with a heart condition. Thereupon Redden returned to Monroe.

During the following month of August Redden purchased another house on Willow Drive in Monroe and moved there with his family on or about the first of September. Then, on September 11, 1975, while the Magnolia Drive house was vacant, the conspiracy was consummated and that house was burned.

Thereafter Boone contacted Redden and demanded an additional $400 which he said would be used to pay someone

who had slowed the fire truck down so the house could burn. This payment was not made.

Redden then made a claim for the insurance, collected $51,000, $41,000 for the building and $10,000 for the contents, paid the mortgage on the house, sold the lot for an additional $10,000 and paid Boone $1,900, the balance due on $4,100 which was the ten percent agreed upon for burning the building.

[6] During Redden's testimony, defense counsel objected to all evidence relating to the aborted plan to burn the Farmerville house. When the objections were denied and the evidence was admitted, he moved for a mistrial contending that this testimony was evidence of another crime committed by defendant which was inadmissible. To permit such testimony, he argued, was grounds for a mistrial under Article 770(2) of the Code of Criminal Procedure. Moreover, he reasoned, the testimony related to a prior offense which was inadmissible because defendant had not been notified in advance as required by the decision in *State v. Prieur*, 277 So.2d 126 (La. 1973), that evidence of a prior offense would be presented.

The circumstances surrounding the burning of Redden's Farmerville house were incidents of an ongoing conspiracy to defraud the insurance companies who insured Redden's houses. When the Farmerville plan aborted, the identical conspiracy involving the identical conspirators was shifted to the Magnolia Drive house in Monroe with the identical ends in view. Money paid by Redden for the burning of the Farmerville house was to be applied to the burning of the Monroe house instead. And the initial agreement to pay Boone and Allen ten percent for burning the Farmerville

house was to apply to the burning of the Monroe house. It was impossible, therefore, to prove the agreement to burn the Monroe house without mentioning the agreement entered into in connection wht the Farmerville house.

Evidence of the Farmerville caper was necessary to explain the facts surrounding the commission of the offense in Monroe. As such it was relevant and admissible. La.Rev.Stat. 15:441. The fact that the events and circumstances leading to the commission of the offense forming essential elements of the crime charged occurred over a period of months does not, under the circumstances of this case, render evidence of the Farmerville conspiracy inadmissible or irrelevant; nor does that evidence, because of the time factor separating the chain of events, become a separate offense. All of these activities were integral parts of a single transaction. Facts and circumstances of illicit conduct do not always fall into neat, compact patterns.

For these reasons the trial judge properly admitted evidence of the Farmerville conspiracy. *See State v. Kaufman;* 331 So.2d 16 (La. 1976), *cert. denied*, 429 U.S. 981, 97 S. Ct. 495, 50 L.Ed.2d 591; *State v. Joseph*, 341 So.2d 861 (La. 1977).

In addition to the assignments of error which have been found to be without merit, defendant argues in brief that error is discoverable by a mere inspection of the pleadings and proceedings, and for that reason should be considered by this Court on appeal under the authority of Article 920 (2), of the Code of Criminal Procedure.

[7] In stating in brief that the trial judge failed to afford defense counsel access to a presentence report and an opportunity to rebut any adverse information which may be contained in such a report, defense counsel does not designate any portion of the record which will support his assertion. His brief does state, however, that he requested a copy of the report in order that he might determine whether it contained adverse information which was false or unfounded and which could be rebutted.

To support his position defense counsel relies upon this Court's decision in *State v. Underwood,* 353 So.2d 1013 (La. 1978), where the case was remanded to allow defense counsel to rebut adverse information in a presentence report. He concedes, however, that the *Underwood* case is distinguishable in that the presentence report in that case was shown to contain false information, whereas no such showing is made in the instant case. Nevertheless, defense counsel urges this Court to implement the *Underwood* decision by affording an opportunity to the defendant to view the presentence report to ascertain whether it contains false information detrimental to his case.

In the absence of a designation of that portion of the record which would establish that defense counsel made a timely request to view the presentence report which was denied, and in the absence of any showing whatever that the presentence report contained false information prejudicial to defendant, this Court's unanimous opinion in *State v. Berain,* 360 So.2d 822 (La. 1978), is controlling. There Chief Justice Sanders wrote:

> "Louisiana Code of Criminal Procedure Article 877 provides that the pre-sentence investigation report utilized by the judge in imposing sentence is privileged. 'Before imposing sentence the court may advise the defendant

or his counsel of the factual contents and conclusions of any pre-sentence investigation report.' LSA-C.Cr.P.art. 877. In *State v. Underwood,* La. 353 So.2d 1013 (1977), this Court vacated the defendant's sentence due to the trial court's error in not allowing defense counsel access to the pre-sentence report and an opportunity to rebut a false statement in it. That holding is inapplicable to the present situation. In *Underwood,* there was proof that the pre-sentence report was materially and prejudicially false. Here, there is no such proof or allegation. Moreover, the record does not contain a request by the defense for the report. Absent such a request, we find no error. *State v. Norris,* La., 347 So.2d 225 (1977)." See also La. Code Crim. Pro.arts. 875-76; La.Rev.Stat. 15:574.12.

For the reasons assigned, the conviction and sentence are affirmed.

TATE, Justice, concurring: I concur, but with reservations as to the rationale and result as to Assignment 2.

DENNIS, J., concurs and assigns reasons.

DENNIS, Justice, concurring.

The majority's reliance on La.R.S. 15:455 is misplaced. The "co-conspirator" exception to the hearsay rule, which is itself subject to criticism, see, Comment, The Co-conspirator Exception to the Hearsay Rule, 37 La.L.Rev. 1101 (1977), does not provide a foundation for the introduction of evidence concerning a conspiracy to commit a crime not charged in the indictment.

Nevertheless, evidence of the Farmerville arson conspiracy was admissible in this case as part of the res gestae. Recent decisions of this Court have required a very close connexity between the crime charged and the crime sought to be introduced into evidence. *State v. Schwertz,* 354 So.2d 1332 (La.1978); *State v. Mitchell,* 344 So.2d 1026 (La.1977). See also, The Work of the Louisiana Appellate Courts for the 1973-1974 Term-- Evidence, 35 La.L.Rev. 525, 526-27 (1975).

APPENDIX B

STATE OF LOUISIANA PARISH OF OUACHITA
FOURTH DISTRICT COURT

STATE OF LOUISIANA FILED: March 3, 1978

VS. NO. 37,504

JAMES H. BOONE s/ Signature Illegible
Deputy Clerk

PER CURIAM STATEMENT OF TRIAL JUDGE
TO ASSIGNMENT OF ERROR

Per Curiam to Assignment of Error No. 1:

The thrust of this Assignment of Error is that the Court erred in refusing to order the State to reveal to the defense by which method under the statute the arson with intent to defraud was committed, i.e., setting fire to or damaging by explosive substance, any property, with intent to defraud. The State, in its argument, took the position that it did not have to disclose any of its physical evidence to the defense and that defendant had been properly informed of the nature and cause of the charge against him. The defendant was properly charged under the proper statute and the law is clear that a defendant is not entitled to the details of the evidence with which the State expects to prove its case. To have required the State to tell the defendant in its answer to the Bill of Particulars whether the arson was caused by setting fire to or damaging by explosive substance would have required the State to disclose its physical evidence. It should be noted, however, that the State did agree to allow the defense experts to examine the physical evidence the State in-

tended to introduce. This examination, if taken advantage of by the defense, would have given the defense, more than likely, the answer to the question by what method the arson was committed. This Assignment lacks merit.

s/ William Norris, III
William Norris, III, Judge

APPENDIX C

Monday, September 19, 1977

Division E, Courtroom No. 1

Court opened pursuant to adjournment. Present: Hon. John R. Joyce, Judge; Cynthia Knutzen and Omer Weir, Deputy Sheriffs; Grace Hudnall, Court Reporter; Lou A. Easterling, Deputy Clerk.

37-504 - State of Louisiana vs. James H. Boone

Defendant present with his attorney, Hon. James A. Hobbs, and at this time Mr. Hobbs, on behalf of the defendant requested a copy of the pre-sentence investigation and to said request the Court denied, and to the Court's ruling Mr. Hobbs requested that his right be reserved to the Bill of Exception, to which the Court noted. Upon inquiry by the Court defendant stated he was prepared for sentence to be imposed, whereupon the defendant was sentenced on the first count to 3 years at heard labor to be remanded to the Louisiana Department of Corrections. The execution of this sentence was hereby suspended and the defendant was by the Court placed on supervised probation for a period of 5 years subject to special conditions of probation which the defendant stated he understood and accepted. On the second count, the defendant was by the Court sentenced to serve 5 years in the Ouachita Parish Jail, not to run concurrent with any other sentence imposed. At this time on behalf of the defendant, Mr. Hobbs asked for and received orders or Appeal to the Supreme Court of the State of Louisiana, returnable on or before November 18, 1977, with the Designation of Record due on or before September 23, 1977, and

Assignment of Error returnable on or before November 1, 1977. Defendant is to remain on the same bond.

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APPENDIX D

STATE OF LOUISIANA PARISH OF OUACHITA
FOURTH DISTRICT COURT

STATE OF LOUISIANA FILED: August 26, 1977

VS. NO. 37,504 s/ Dorothy L nn

JAMES H. BOONE Deputy Clerk

CHARGE TO JURY

When you retire to the jury room for your deliberations you should first elect one of you to serve as foreman. Then you may deliberate or discuss or debate the evidence in trying to determine the facts and the applicability of the law given you by the Court. There are no limitations on your deliberations, except, you are confined to the evidence in the case and the law as given you by the Court. However, when it comes time for you to decide on a verdict, each juror must arrive at his individual and separate conclusion and he must vote his separate and individual conscience.

Now, the form which the Court will hand you contains two (2) responsive verdicts. Five of the six of you must concur in order to render any verdict, on each count, and it must and can only be one of those listed on the form. When you have reached your verdict, five of the six of you having agreed on the same verdict, your foreman shall write that verdict on the back of the form, using the actual words describing the verdict. He should then put the date, and sign his name, and the word, "foreman". When all of this is ac-

complished, you may inform the sheriff that you are ready to return to the Court room.

You may now retire to the jury room.

s/ John R. Joyce
John R. Joyce, Judge

Supreme Court, U. S.
FILED
JUN 11 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78 - 1407

JAMES H. BOONE,
Defendant-Petitioner

versus

STATE OF LOUISIANA
Plaintiff

RESPONSE IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA B. RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

JOHNNY C. PARKERSON
DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 78 - 1407

JAMES H. BOONE
Defendant-Petitioner

v.

STATE OF LOUISIANA
Plaintiff

REPLY BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The State of Louisiana, plaintiff herein, prays that this court deny the issuance of a Writ of Certiorari, to review the judgment and decision of the Supreme Court of the State of Louisiana affirming the conviction of James H. Boone for two counts of the offense of arson with intent to defraud in the Fourth Judicial District Court, Ouachita Parish, Louisiana.

JURISDICTION

Plaintiff-respondent states that Parts 2 and 3 of the proposed questions presented by petitioner do not invoke the jurisdiction of this Court for reasons hereinbelow described.

REASONS FOR DENIAL OF THE WRIT

Part 1: LACK OF NOTICE OF NATURE AND CAUSE OF ACCUSATION

Petitioner alleges that he was not advised of the nature and cause of the accusations against him in accordance with the requirements of the Sixth Amendment, United States Constitution.

In this matter, the defendant Boone was charged with two counts of arson of dwelling houses with the intent to defraud insurance companies in contravension of the provisions of the Louisiana Revised Statutes 14:53.

Article 53 of the Criminal Code of Louisiana defines the crime charged as follows:

> "Arson with the Intent to DeFraud is the setting fire to, or damaging by any explosive substance, any property, with intent to defraud."

Defendant-petitioner asserts that inasmuch as the crimes charged may be committed by either of two methods that he should have been advised of the method the State intended to prove its case in response to defendant-petitioner's Motion for Bill of Particulars.

The State, in response to said Motion for Bill of Particulars, chose not to bind itself to a conclusion concerning a scientific analysis of physical evidence. Rather, the State offered to the defendant the opportunity to examine all of its physical evidence in order that the defendant might draw

his own conclusion as to how the fire was set. Defendant-petitioner did not prevail himself of the opportunity to analyze and inspect the physical evidence in possession of the State. Had he done so, defendant-petitioner would have been in an equal position to understand the nature and cause of the Origin of these fires.

It is obvious that the State, in response to defendant's motion for bill of particulars, did all that could be constitutionally required of it by offering to defendant the opportunity to examine its physical evidence. Such an offer constituted a far more reasonable approach to adequately inform a defendant of the nature and cause of accusations against him. As defendant was properly advised of the nature and cause of charges against him, Part 1 has no merit.

Part 2: DEFENDANT-PETITIONER CHALLENGES THE CONSTITUTIONALITY OF A NON-UNANIMOUS SIX PERSON JURY IN A FELONY CASE

This particular issue was not raised at the State District Court level or at the Louisiana Supreme Court level. It is clear that the United States Supreme Court does not decide federal constitutional issues raised before it for the first time on review of State Courts' decisions. As the State Courts did not pass on this issue, it is submitted that these portions of the defendant-petitioner's Application for a Writ of Certiorari should be dismissed for want of jurisdiction. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1161 (1969); *Tacon v. State of Arizona*, 410 U.S. 351, 93 S.Ct. 998 (1973).

Regardless, it is submitted that the decision rendered by

this Honorable Supreme Court of the United States in case No. 78-90, Daniel Burch, et al, petitioners versus State of Louisiana (April 17, 1979) is dispositive of the issue presented in Part 2 of the Writ Application. Defendant-petitioner Boone was convicted by unanimous jury verdicts of both counts of arson with intent to defraud. As Boone's convictions were by unanimous jury verdicts, the decision of this Court in the Burch case would require that these convictions be affirmed.

Part 3: REFUSAL TO FURNISH DEFENDANT WITH COPY OF PRE-SENTENCE INVESTIGATION

Again, defendant raises issues before this Honorable United States Supreme Court which were not presented for consideration in the State Courts.

For the reasons hereinabove cited, it is respectfully submitted that this Court should not decide issues raises here for the first time on review of State Courts' decision.

For the foregoing reasons, it is respectfully submitted that this Honorable Supreme Court of the United States should deny defendant-petitioner for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA B. RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

JOHNNY C. PARKERSON
DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT
POST OFFICE BOX 1652
MONROE, LOUISIANA 71201

BY: _____
JOHNNY C. PARKERSON

CERTIFICATE

It hereby is certified that a copy of the foregoing Response was this day served upon J. Michael Small, Attorney for Defendant-Petitioner, 711 Washington Street, Post Office Box 1792, Alexandria, Louisiana, 71301, by depositing same in the United States mail, postage prepaid.

MONROE, LOUISIANA, this 7th day of June, 1979.

_____
JOHNNY C. PARKERSON
DISTRICT ATTORNEY
MONROE, OUACHITA PARISH,
LOUISIANA